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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 488

W. F. SNAKARD, *Petitioner*

v.

FRANKFORT OIL COMPANY, *Respondent*
A division of Carstairs Distilling Co.
(now Calvert Distilling Co.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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A division of Carstairs Distilling Co.
(now Calvert Distilling Co.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 18, 1960.

CITATION TO OPINION BELOW

The United States District Court for the Western District of Oklahoma gave judgment for petitioner without opinion. That court's findings of fact and conclusions of law are unreported but are in the record at pp. 115-127, and are reproduced herein in Appendix A. The opinion of the United States Court of Appeals, Tenth Circuit, is reported in 279 F. 2d 436 and printed in Appendix B hereto.

QUESTIONS PRESENTED

1. Whether a United States Court of Appeals, when it determines that an essential fact has not been found by the trial court trying the case without a jury on disputed evidence, predominantly oral, must remand the case to the trial court so that a finding may be made under Rule 52 of the Federal Rules of Civil Procedure?

2. Whether a United States Court of Appeals, when the trial court has failed to make an essential finding of fact may act as a trial court and supply the omitted finding without violating Rule 52 of the Federal Rules of Civil Procedure, especially when the evidence in the trial court was in conflict?

3. Whether a United States Court of Appeals, in reviewing findings of fact made by a trial court on disputed evidence in a case involving slander of title, may refuse to give force and effect to a state statute and state Supreme Court decisions thereunder which prescribe that the element of malice is presumed when there is an injurious publication and no justifiable motive for making it is show ?

4. Whether the action of the Court of Appeals for the Tenth Circuit in reversing a judgment for petitioner and dismissing the complaint so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

5. Whether a *successful* litigant in a nonjury case in a United States District Court must object to the omission of a finding of fact by the trial court, and whether a United States Court of Appeals may reverse on that ground without remanding the case to the trial court to supply the omitted finding, when the case was decided

in that litigant's favor in the District Court after the trial judge had heard and considered conflicting evidence, predominantly oral?

6. Whether a successful litigant in a nonjury case in a United States District Court as appellee on appeal to a United States Court of Appeals is entitled to have the evidence viewed in the aspect most favorable to it, and to have the benefit of all reasonable inferences deducible therefrom?

7. Whether a United States Court of Appeals may substitute its own findings of fact for those of the District Court and reverse the District Court judgment without ruling that the lower court's findings are clearly erroneous?

8. Whether a United States Court of Appeals may reverse a United States District Court nonjury judgment in favor of petitioner *and direct the District Court to enter judgment in favor of respondent*, when the pleadings and record indicate another sound basis was raised for the trial court's decision, which is unaffected by the omission of an essential finding and other bases relied upon by the Court of Appeals to reverse?

STATUTES INVOLVED

Federal Rules of Civil Procedure

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which con-

stitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Title 12 Oklahoma Statutes, Section 1445:

An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

Title 54 Oklahoma Statutes, Section 10:

In all proceedings connected with the formation, conduct, dissolution and liquidation of the partnership, every partner is bound to act in the highest good faith

toward his co-partners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1960. (T.R. 970; App. B). Rehearing was denied on July 21, 1960 (T.R. 1020). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

Involved in this petition are the petitioner, W. F. Snakard, an oil operator,[1] and the respondent, Frankfort Oil Company, a division of Calvert Distilling Company, a Maryland corporation. Prior to May 31, 1955, Frankfort was a division of Carstairs Distilling Company which merged with Calvert on that date. The jurisdiction of the District Court was invoked because of diversity of citizenship, petitioner being a citizen of Oklahoma and respondent a citizen of Maryland.

The oil properties involved are located in Lincoln County, Oklahoma, and collectively are known as the North Wellston Field. In earlier years oil was recovered at a substratum known as the First Wilcox, which was more or less depleted before the advent of the circumstances of this case. The oil involved here was discovered at a substratum designated as the Second Wilcox, largely due to the perspicacity of petitioner.

[1] Mr. Snakard is an oil explorer, a person who independently searches for wells that will be productive of oil. It is a hazardous, uncertain living, depending upon a man's skill and knowledge as well as luck. Working on little capital, he must rely on oil companies to drill his leases. If the wells are dry, he loses all of his investment. If oil is found, he must rely on his co-venturers for fair treatment.

Prior to October 12, 1954, petitioner acquired twelve commercial oil and gas leases on 1280 acres in Lincoln County, Oklahoma. Most of the leases commenced on July 1, 1954, and expired on or before July 1, 1955.

Between October 12 and November 11, 1954, petitioner and respondent entered into a series of agreements in connection with petitioner's leases. Under these agreements:

1. Respondents acquired ½ interests in petitioner's leases with first refusal option to purchase petitioner's remaining share. (T.R. 18) (Fdg. 1)

2. Petitioner contracted to drill the first test well on the leases involved. (T.R. 20) (Fdg. 2)

3. Should the test well be productive, the respondent would become the "operator of all the properties," for full development of the whole block of leases. Thereafter petitioner could elect to participate in the development of any subsequent wells and pay ½ the expense. If he did not participate, then Frankfort would own ⅞ths of the production until 200% of ½ of the cost of drilling the well had been paid to Frankfort from ⅜ths of the working interest production. Then the ⅜ths would revert to petitioner. At all times petitioner would be liable for ⅛th of the operating cost of any producing well. (T.R. 26, 29) (Fdg. 3)

4. Later changes provided that the test well would be a new drilling instead of a reopened old well, and that as to a few subsequently acquired portions of leases allowing a ¼th owner's royalty the additional royalty would come from petitioner's half interest in the lease. (T.R. 51, 52)

The several instruments involved are printed as Appendix C hereto.

In January 1955, petitioner completed the test well designated as Stanolind No. 1 and it gave indications of excellent oil prospects in the so-called Second Wilcox stratum, but water problems prevented actual commercial production at that time. (Fdg. 6)

Respondent, realizing the good prospects augured by Stanolind No. 1, undertook to fulfill its commitments but gave no notice to petitioner of any intent to drill. (Tr. 137). It brought in the Inland Oil Company to operate for it in the North Wellston field.[2] (T.R. 137; 197-200) Inland, which was so closely related to respondent that the latter considered it its "district office" (Pl. Ex. 2-B, T.R. 590), began drilling after the Stanolind discovery to the west of it. Around March 1, 1955, it brought in an excellent producing well in the Second Wilcox known as Erwin No. 1. (Fdg. 9) A month later Inland brought in another producer directly east of Erwin No. 1, called Meadors Estate No. 1. Thereafter Inland drilled a series of wells north and mainly east of Erwin No. 1, up to July 1955. (Fdg. 16)

Immediately after the first producer, Erwin No. 1, was completed, respondent approached Mr. Snakard, the petitioner, about "farming out" the leases to Inland. (Tr. 144) "Farming out" would have reduced petitioner's interest in this promising property by ½. He refused. Shortly thereafter one of respondent's Inland employees, Burkey, offered to buy petitioner's interest in the North Wellston Field for $100,000 to be "paid" by Inland.[3] (Fdg. 10) He refused. (T.R.

[2] Inland was a defendant in this case, but because of its bankruptcy, the complaint was dismissed without prejudice. (T.R. 132)

[3] Inland was $200,000 in the red at this time (T.R. 234), and the $100,000 was to be supplied by respondent. (T.R. 503-505) Respondent's general manager, M. R. Shaffer, could not "recall" whether he discussed this deal with his Inland employees, but did not deny it. (T.R. 350-351)

234) The "farm out" request was then renewed by respondent. (Fdg. 10) Despite respondent's holding out to him that the most promising direction for drilling lay to the northeast and did not include the leases to be farmed out or sold, petitioner refused the offer to sell and the demands for farming out to Inland. The other reason for farming out given to Snakard by respondent was that possibilities were doubtful to the south. (Tr. 148)

While respondent was thus pressuring Mr. Snakard to sell out to its "District Office" or to reduce his interest in the leases south of Erwin No. 1 by farming out, it was in possession of geologic data obtained through a seismograph study and other studies which were withheld from Mr. Snakard (T.R. 268), although he was billed for part of it (T.R. 313-316). The data showed that the most promising area from Erwin No. 1 lay to the south and was included in leases Mr. Snakard urged developed. (T.R. 265-7) (Fdg. 16).

From tests made on Erwin No. 1, Frankfort's Exploration Manager, Caswell, reported to its management on April 1, 1955 that "in his opinion a forty acre location on this Second Wilcox structure had a potential production of two million barrels of oil", and that the two locations south of Erwin No. 1 were about "as sure as you could have" for Second Wilcox production. (T.R. 406, 410, 415) (Pl. Ex. 22, T.R. 592) (Fdg. 17)

At about the same time the President of Inland, Cochran, and its Geologist, Roy Carmach, went to Bartlesville, Oklahoma and displayed to M. R. Shaffer, Frankfort's General Manager and C. A. Caswell, its geologist, a sub-surface geological map, which showed the top of the Second Wilcox structure extended onto

the Thomas and Christian leases (T.R. 259-261, 415-417), both south of Erwin No. 1.

Following petitioner's refusals either to sell out his interest to Inland Oil or to farm out to Inland Oil,[4] respondent, on March 8, 1955, filed a caveat in the office of the County Clerk of Lincoln County (Fdg. 12) that was designed to and did eventually prevent petitioner from saving his interests in the leases south of Erwin No. 1.[4] The Caveat read:

"Caveat

State of Oklahoma, County of Washington, ss:

Know All Men By These Presents:

Whereas, by letter agreement dated October 12, 1954, accepted by W. F. Snakard on November 11, 1954, the undersigned Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc., entered into a contract with W. F. Snakard covering the following described land located in Lincoln County, Oklahoma:

All of Section Thirty-five (35) and Southwest Quarter (¼) of Section Thirty-six (36), Township Fifteen (15) North, Range Two (2) East; and West One-half (½) of Section Two (2) and Northeast Quarter (¼) of Section Three (3), Township Fourteen (14) North, Range Two (2) East, and:

Whereas, said contract provides for the sale, transfer and assignment of W. F. Snakard to the undersigned Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc., of an undivided ⅞ths interest in and to all of the oil and gas leases then owned or thereafter to be acquired by W. F. Snakard on the above described land.

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[4] At T.R. 342, M. R. Shaffer, respondent's general manager, testified that the caveat's purpose was to protect respondent's "vested interest" in the leases.

Now, Therefore, the undersigned Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc., does hereby notify the world that it has performed all of the terms of said contract with W. F. Snakard and is entitled to and is the owner of an undivided 7/8ths interest in and to all of the oil and gas leases covering the above described land and any party purchasing same does so at his own risk and peril and with notice of the rights of the undersigned adverse thereto.

Witness, the execution hereof this 5th day of March, 1955.

Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc. By M. P. Shaffer, Manager

State of Oklahoma, County of Washington, ss:

Before me, the undersigned, a Notary Public, in and for said state, on this 5th day of March, 1955, personally appeared M. R. Shaffer, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Manager and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

Imogene Coleman, Notary Public

My commission expires: May 27, 1958 (SEAL).

Filed: Lincoln County, Oklahoma, Mar. 8-1955- 9:00 A.M., Gerald Clark, County Clerk, By Deputy (SEAL)." (T.R. 15-16)

As petitioner pointed out at page 13 of his Petition for Rehearing, Frankfort:

> "thus stated to Snakard and the world:
>
> (1) We have chosen the drilling commitments on each and every separate lease in the block.

(2) We have drilled a well on each of these leases.

(3) We have obtained production from each of these wells.

(4) Snakard has not paid one-half of the costs of drilling such wells.

(5) We, therefore, own seven-eighths of the leases (not production).

This was an absolutely false statement and was the assertion of an absolutely false interest, because it had not obtained production but from one well, had not drilled and obtained production from any other well and had not performed its contract, and therefore did not possess a seven-eighths interest in any of the leases other than the one it had obtained production from. It was particularly false, deliberate, unjustified, and therefore, malicious if, as Frankfort, has always maintained, it had no intention or obligation to drill these wells (Cf. Court's Findings and Conclusions, R. 121)."

Not only was this caveat a breach of the duty respondent owed its co-venturer, but it was a slander of title, asserting, as it did a $\frac{7}{8}$ths interest in the leases, when in fact it only held a $\frac{1}{2}$ interest in production unless it actually drilled *and* brought in a producing well on any give lease. Furthermore, Frankfort's caveat asserted ownership of $\frac{7}{8}$ths *of the leases*; even had it drilled them and achieved production, it would have acquired only a *temporary* $\frac{7}{8}$*ths interest in the production of the well*, lasting only until the cost was paid back under the contract terms. Without even going on these lands and drilling Frankfort deliber-

ately represented to the "world" that it owned more of these leases than it could have owned even if production were achieved. Of course, after July 1, 1955, when the joint venture expired and Frankfort still refused to withdraw the caveat, this misrepresentation, this slander of title, became an even greater lie because then Frankfort owned nothing. Only bad faith, and thus malice, explain Frankfort's action.

At the trial, respondent contended that the caveat was prepared and filed because petitioner had failed to deliver assignments to Frankfort covering the undrilled leases. (This included all but the Erwin and Stanolind leases, which had been drilled at that time.) (T.R. 424) But cross-examination of Frankfort's attorney, Trippet, who gave the testimony referred to above, brought out the facts that:

1. He, Trippet, was to prepare the instruments of assignment (T.R. 430), and send them to petitioner (T.R. 431).

2. Petitioner had made the necessary assignments for the only leases drilled at the time of the caveat, the Erwin and the Stanolind. (T.R. 430, 431)

3. He never wrote any letters to petitioner, prior to the April 8, 1955 letter, requesting assignments. (T.R. 431)

4. He never sent any assignments to petitioner to be executed before he and petitioner's attorney in late April, "worked out the deal." (T.R. 431)

The demands upon petitioner to farm out continued after the filing of the caveat.

When the caveat failed to force petitioner into the farm out, respondent decided to drill to the north and east, leaving the Thomas and the Christian undrilled. This was calculated to obtain petitioner's consent to the farm out. If the farm out deal had not been contemplated, Frankfort would have drilled both the Thomas and the Christian leases (T.R. 362).

Finally, in June, with the July 1, 1955 deadline fast approaching, petitioner asked respondent to release the caveat so that he could contract with someone to commence drilling on the south leases and save them. *Although Frankfort's attorney advised release* (T.R. 439), Snakard was refused. In desperation, on July 1, 1955, he moved equipment onto two of the leases, the Thomas and the Christian, to begin drilling. He was unable to get anyone to drill on three other leases because of the caveat. (T.R. 168-170, 188)

Respondent obstinately refused to allow petitioner to save his interest even though it had no intention of saving them itself. In a telegram on June 28, 1955 (Pl. Ex. 16, T.R. 582) respondent's vice president demanded petitioner to farm out to Inland and accused him of tryng to "squeeze out" Frankfort. (Pl. Ex. 16, T.R. 582)

Respondent may have thrown away its opportunity to profit from the rich Thomas and Christian leases, for reasons known only to the men who ran it.[5] But, having done so, it was determined that petitioner would salvage nothing either. It complained to the Corporation Commission and had petitioner's operation stopped several times by claiming the well he was drilling was

[5] See p. 24, paragraph 8, *infra*.

"off-spot"[6] (T.R. 164, 165, 251) although no complaint was made when a subsequent operator, not connected with petitioner, drilled "offspot" (T.R. 222) on the Christian lease, after petitioner had to give up.

Even after the joint venture of petitioner and respondent expired (by expiration of the leases), Frankfort refused to remove the caveat. Its presence in the County Clerk's records eventually forced Mr. Snakard to abandon his effort to save the Thomas and Christian leases because he was unable to obtain the necessary funds. The caveat killed the interest of possible financial aid. (T.R. 192-3, 255, 278) Petitioner pleaded with Frankfort's officials (Pl. Ex. 25, T.R. 597) but to no avail. Despite the fact that Frankfort's ½ interest in the undrilled leases ended on July 1, the caveat asserting a ⅞ths interest remained filed of record until February and March, 1956.

The Christians, father and son, on or about July 7, 1955, themselves tried to have this caveat removed as to their lease. They went to see Eldon E. Scott, Frankfort's attorney at Bartlesville. He refused them in the following language:

> "I don't give a goddamn what anybody says. I'm not going to release anything that Bill Snakard has got his hands on, now or ever. * * * Bill won't keep his word with anything. * * * We had a deal made with Inland Oil and Gas Company down there to farm that stuff out. * * * He blowed that up for us. * * * We are not going to do anything to help him or anybody else, and we are not going to release it." (T.R. 217-218)[7]

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[6] "Offspot" means a well that is not in a position approved by the Corporation Commission in relation to adjacent leases.

[7] Scott was a defense witness and was present in court. He did not deny this testimony.

Mr. Christian and his father were obliged to hire an attorney who finally succeeded in getting Frankfort to release its caveat in March, 1956 after Shakard had to give up. His driller, Bradley, had to withdraw in December, 1955. (T.R. 252)[8] (Pl. Ex. 28, T.R. 631) The release was made only after respondent knew peti-

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[8] Joe Bradley agreed with Petitioner to drill the Thomas lease to the Second Wilcox and obtained financial backing of Helmerich and Messenger of Chicago but Respondent refused to release its Caveat and Bradley could not get the money to drill. This refusal was in late July after the expiration of the Thomas lease (T.R. 253-255). Consider this colloquy:

> "The Court: Was there any other reason why you couldn't drill except this Caveat? • • •
> The Witness (Bradley): Well, your Honor, I was. I didn't have the money to drill it and I couldn't get nobody to help me put any money in there with me.
> The Court: I know was the Caveat—
> The Witness: (Interposing) That seemed to be the main reason, yes." (T.R. 255)

As late as January, 1956, Respondent refused to release its Caveat and a deal that Petitioner made with the Burke Royalty Company to finance the drilling of the Thomas, Christian and Simpson leases fell through when Respondent refused to release the Caveat unless it received an interest in the leases. Rupert E. Wilson, Jr. representing Burke Royalty so testified (T.R. 278). Marion Christian testified (T.R. 216) that, although Petitioner's lease on his property expired July 1, 1955, he could not make a new lease to Joe Bradley or a number of others because "none of them would do anything as long as this Caveat was on there." Carl Simpson testified (T.R. 274) that it was February, 1956, before he could get Respondent to release its Caveat on his property. Meanwhile Simpson had been anxious to lease to Petitioner. S. F. Christian testified (T.R. 321) that about July 7, 1955, Respondent refused to release the Caveat on the Christian lease because it disliked Petitioner and he had to hire a lawyer to obtain the release. Petitioner testified as to his deal with Bradley to drill the Thomas, Christian and Simpson leases and how Bradley let him out of the contract when he "couldn't give him clear title" (T.R.

tioner was no longer drilling on it. (T.R. 629, Pl. Ex. 27-B) Snakard did not obtain a renewal of the lease.

After Mr. Snakard's withdrawal, other parties brought in ten producing oil wells, between July 1955 and July 1958, on leases Frankfort refused to drill or release, three on the Christian, six on the Thomas, and one on the Simpson. (Pl. Ex. 7 and 8 T.R. 915, 919)

During the months prior to July 1 when petitioner was endeavoring to get respondent either to drill the leases south of Erwin or to release the caveat so that he could save them, respondent was receiving data indicating more and more that the south leases would be rich in oil. (Fdg. 16, 17) It not only refused to act on this data and withheld it from Mr. Snakard (Fdg. 18) in violation of its fiduciary duty, but it deliberately and falsely indicated to him that the leases to the north were more promising. Its conduct had an effect on others who might have helped petitioner.[9] (T.R. 151, 216) (Fdg. 19)

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167); and, Petitioner also offered to prove that a similar deal with Burke Royalty fell through when he could not clear the title and that he had similar unsuccessful discussions with Armond Jule, Robert L. Owen and T. C. Christenson of Los Angeles (T.R. 171).

[9] For instance, Joe Wolf, President of the Summit Drilling Company, one of the oldest drilling companies in Oklahoma and financially capable of drilling a well to the depth of the Second Wilcox sand (T.R. 186-187) testified that petitioner asked him to drill the Thomas lease before it expired on July 1, 1955. Wolf refused to finance the drilling because respondent had not drilled. He told petitioner that "if it wasn't good enough" for respondent to drill, it wasn't good enough for him (T.R. 188).

Yet when shown some of the geological information (Plaintiff's Exhibit 33-D), Wolf said it showed "a terrific picture in anybody's oil experience" and was "a perfect place for a well" (T.R. 188 and 193-194).

Frankfort prepared all the instruments comprising the joint venture. A printed operating agreement was among these, but it was modified in an important respect by a separate letter agreement (App. C-3) which made Frankfort the "operator", gave it the right to choose which leases to drill and left Snakard only the choice of participating or not. Snakard could also elect to drill himself leaving Frankfort the choice of participating or releasing all interest in a given lease. After it became obvious that the lease block was going to be very productive, Frankfort "elected" to drill all the leases in a letter to petitioner on April 8, 1955. (Fdg. 13) [M. R. Shaffer admitted the letter referred to all the undrilled leases (T.R. 382)]. With this in mind, Frankfort's actions become transparent. It is required oil field practice to drill "offset" wells following an important strike. Offsetting is to drill new wells in all directions from the proven producer in order to trace the oil deposit. In this case Frankfort *chose* to drill only to the north. Some justification, if the geologic data in Frankfort's hands is ignored for the moment, may be found for the first 2 or 3 wells. These were offsets north, northeast, and east, but the next three were even further north beyond all of these despite the fact that these were dry, while not a single drill was set up south or southwest of that first producing well, Erwin No. 1, which was still the best.[10] [M. R. Shaffer stated in a deposition that the geographical map showing the Thomas lease to be better than Erwin No. 2, was not in respondent's possession when the latter was drilled on May 29, 1955. The map was dated May 16, 1955. (T.R. 383)]

[10] If Erwin #1 is considered the center of a clock, respondent drilled at 12, 2, and 3; and then beyond these unproductive offsets, leaving the lower half of the clock untouched.

Frankfort deliberately refused to validate the south leases despite its knowledge of the excellent prospects there, and despite its duty to its co-venturer to do so.

But the wrongs involved do not stop with Frankfort's choice of its drilling sites, its denial of the geologic data to Snakard, nor its outrageous caveat. In its desire to squeeze out its co-venturer, it even represented to him and to the Corporation Commission, an agency of the state, that a non-producing well, Erwin No. 2 was a producer.[11] This was accomplished by hooking Erwin No. 1 and No. 2 to the same storage tank and representing the oil therein to be the product of both wells when it all actually came from No. 1, which was overproducing to fill its quota and No. 2's quota, set by the Corporation Commission. (Fdg. 21) And later W. R. Shaffer told petitioner that one of the dry wells north of Erwin No. 2, was a hundred barrel an hour producer (T.R. 216). This was false. (T.R. 235).

These and other actions of respondent resulted in enormous losses to petitioner actually in excess of the One and one-Half Million Dollars awarded by the Trial Court in this case. For brevity and to avoid unnecessary repetition, other incidents and facts will be brought out in subsequent portions of this petition.

Disposition in the District Court

This case was originally filed in the Lincoln County District Court by petitioner. It was removed to the United States District Court for the Western District

[11] M. R. Shaffer, the general manager of respondent, told the unbelievable story on the stand that he thought Erwin No. 2 was a producer until shortly before the trial, that he neglected to read company reports and logs indicating it was dry. (T.R. 376-9)

of Oklahoma on the motion of respondent because of diversity of citizenship. Petitioner sought a money judgment for damages resulting from breach of contract and slander of title, the appointment of a receiver for the leases involved, and the removal of the caveats.

The case was tried by the Court, the Judge presiding being W. R. Wallace, a jurist exceptionally qualified for the case, having been the General Counsel for Magnolia Petroleum Co. for many years.[12] Judge Wallace decided in favor of the plaintiff after hearing all of the evidence and awarded plaintiff a judgment of $1,493,277.00, plus interest and costs. He made findings of fact and conclusions of law in support of his judgment. (App. A)

The trial court found these facts, among others:

1. That after Erwin No. 1 was found to be an excellent producing well (Fdg. 9) respondent began its attempts to induce petitioner to farm out his interests to Inland, that respondent took "a series of steps calculated to persuade or require plaintiff to accept the farm out proposal with Inland", that these steps continued through March, April, May and June of 1955. (Fdgs. 10 and 11).

2. That respondent filed a caveat adversely to petitioner's interest, which caveat "recited that the contract provided for the sale and transfer from plaintiff to defendant of an undivided 7/8th interest in and to the leases then owned and thereafter acquired by plaintiff, notified the public that defendant had performed its contractual terms and was the owner of an undivided 7/8th interest in and to said leases . . ." (Fdg. 12)

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[12] See *Who's Who In America*, vol. 30, p. 2878, "Wallace, William Robert".

3. That on April 8, 1955, respondent wrote petitioner regarding the undrilled leases and in that letter indicated that respondent elected to drill wells on those leases and requested plaintiff to elect whether to participate or not (Fdg. 13), that on April 15, petitioner by letter elected to be a non-participating party, (Fdg. 16) that on April 18, respondent's attorney notified petitioner that he must execute assignments in the future to each of the leases "as we start wells on them", that "we want to go ahead and get all of these properties drilled by the July deadline . . .". (Fdg. 15)

4. That during April and May of 1955 respondents obtained extensive "seismic information, together with other geological data" which "conclusively showed" that the oil structure discovered at Erwin No. 1 extended southeast into the Thomas and the Christian leases, and that although the acquisition cost of some of this data was charged to petitioner, the respondent never disclosed the data and information to petitioner. (Fdgs. 16-18)

5. That the respondent "repeatedly represented to plaintiff that the producing structure lay to the north and east of the Erwin No. 1 and Meadors Estate No. 1 wells, and that there would be considerable risk in drilling a well on the Thomas lease." (Fdg. 19)

6. That respondent's well drillings were all conducted to the north and east of Erwin No. 1. (Fdg. 20)

7. That Erwin No. 2 was dry, but was reported by respondent as a Second Wilcox producer and that respondent further reported Erwin No. 2 in full production when in fact the oil constituting this alleged production came from Erwin No. 1, and that Erwin No. 2 and other unproductive wells were drilled to the north

and east at a time when respondent had the aforementioned data that the oil structure lay to the south of Erwin No. 1. (Fdgs. 21-22)

8. That respondent was advised by its attorney to release all of the basic leases which were not going to be drilled to plaintiff within a reasonable time prior to July 1, so that plaintiff could effectively deal with such leases (Fdg. 24)

9. That petitioner "substantially performed all obligations resting upon him under the contract" with the respondent. (Fdg. 28)

Judge Wallace reached the following conclusions of law, among others:

1. That a joint venture status and a fiduciary relationship existed between petitioner and respondent under which petitioner had an absolute duty to drill but one well, but each party could elect to drill additional wells on the property involved. (Conc. 1-3)

2. That respondent elected to drill the remaining undeveloped leases and breached its contract with petitioner by failing to do so, that this election was established by the filing of the caveat on March 8, 1955, and by defendant's letter of April 8, 1955. (Conc. 4)

3. That if respondent did not intend to elect to drill all undeveloped leases at the time of the caveat filing that "such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract," that defendant improperly clouded petitioner's title, that this was "contrary to defendant's rights under the agreement and encroached upon plaintiff's contractual

rights, separate and apart from the fiducial relationship." (Conc. 5)

4. That respondent breached its fiducial duty to petitioner "by failing to fairly and openly reveal the geological information it possessed", by misrepresenting the location of the producing structure in attempting to force the farm out to Inland, and by "unwarrantedly claiming a 7/8th interest in this lease through the caveat . . . " (Conc. 6)

5. Petitioner is entitled to damages as a result of respondent's breaches. (Conc. 7)

These findings and conclusions represented the trial judge's considered evaluation of the disputed evidence placed before him. He was, of course, better able to judge the credibility and accuracy of the various witnesses. In reaching his decision, Judge Wallace resolved not only conflicts between the evidence of petitioner and respondent but also between witnesses for respondent. For example, compare the testimony of M. R. Shaffer, a very evasive witness (T. R. 325-398), and C. A. Caswell (T.R. 399-419), as to whether Frankfort Oil Company knew the probability of finding oil on the Thomas and Christian leases.

Judge Wallace made separate findings of fact and conclusions of law on the measure of damages. Both sets of findings and conclusions and the judgment are in the transcript of record at pp. 115 to 127 and attached hereto as App. A.

The Disposition in the Court of Appeals

The respondent appealed from the District Court's judgment to the United States Court of Appeals for the Tenth Circuit, and the petitioner filed a cross-appeal going solely to the measure of damages.[13] The

[13] Dismissed on petitioner's own motion.

Court of Appeals reversed the trial court and remanded with directions to enter judgment in favor of respondent without any determination that any of Judge Wallace's findings were "clearly erroneous." Petitioner sought a rehearing, but this was denied.

In overturning the judgment of the District Court, the Court of Appeals found:

1. That respondent had no obligation to drill on the undrilled leases.

2. That respondent had no contractual obligation to inform petitioner of the important geological data it had obtained concerning the leases.[14]

3. That if respondent fraudulently misrepresented the potential oil field to the petitioner, petitioner was not injured thereby because he did not act in reliance upon it.

4. That no slander of title could be upheld because the trial court failed to find the existence of malice as a fact.[15]

5. That petitioner and respondent entered into a fiduciary relationship requiring the utmost good faith, but that such a relationship is governed solely by the

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[14] Despite the finding by the District Court that "The acquisition cost of some" of the geological "data was charged" to petitioner. (T.R. 119), in Footnote 11, Judge Breitenstein incorrectly states that "The point urged goes only to the accounting between the parties."

It is strange reasoning that Respondent is free not to disclose to its Joint Venturer valuable geological information, the cost of which in part it is charging to him.

[15] Respondent had not challenged the trial court's findings or lack of findings as to malice in either its "Statement of Points" or in its brief before the Court of Appeals.

terms of the agreement between the parties. The respondent had no contractual obligation to provide petitioner with the important information concerning the oil structure and that there was, therefore, no breach of the duty. The caveat was not a breach of the fiduciary duty because respondent had the right to give notice of its interest in the property, although the caveat failed to describe that interest "with complete accuracy". Finally the court said the respondent did not breach the duty by misrepresenting the direction of the potential oil field. The Court of Appeals decided that respondent did not actually know the best direction despite its possession of the geological data. This completely contradicted the trial court's findings, although the Court of Appeals did not state those findings to be "clearly erroneous."

6. With regard to the refusal of respondent to withdraw the caveat *after* the termination of the joint venture on July 1, the Court of Appeals ruled that such *would have been a slander of title had the existence of malice been found as a fact.*

7. That Frankfort was not attempting to obtain petitioner's interest in the leases inasmuch as it *in fact* did not acquire any interest in those leases after July 1, 1955.

8. That petitioner and respondent were equal losers because of the failure to drill these leases as a result of "bad judgment, bad advice, obstinacy and misunderstanding", implying that because respondent was not unjustly enriched by its conduct that it was not guilty of any breaches toward petitioner.

REASONS FOR GRANTING THE WRIT

This petition should be granted in order to:

1. Resolve a conflict between the Tenth Circuit and other Circuits in the interpretation and application of Rule 52 of the Federal Rules of Civil Procedure.

2. Resolve a conflict in principle between this Court and the Tenth Circuit in the exercise of the appellate function by federal appellate courts.

3. Decide an important question involving Rule 52 of the Federal Rules of Civil Procedure.

4. Resolve a conflict between the Tenth Circuit and the Supreme Court of Oklahoma in the interpretation of an Oklahoma statute, in determining the existence of the element of malice in proving the tort of slander of title.

5. Determine whether the Court of Appeals in a diversity action may decide, in contradiction of the Oklahoma law and decisions, that the fiduciary duties of joint venturers are only those expressly defined in their contract.

ARGUMENT

1. The Conflict Between the Tenth Circuit and the Other Circuits

Under Rule 52 of the Federal Rules of Civil Procedure it is the function of the District Court sitting without a jury to find the facts. In reversing the District Court's judgment in this case the Court of Appeals for the Tenth Circuit ruled that the court below "made no finding of malice" on disputed evidence which would be an element in the slander of title cause. As set forth in petitioner's Petition for Rehearing in

the Court of Appeals, this conclusion "is not in accord with the record," and it was pointed out therein at page 3:

> "In the findings of fact and conclusions of law at page 121 of the printed record, Judge Wallace said:
>
> 'Frankfort breached its fiducial duty owed plaintiff . . . by *unwarrantedly* claiming a 7/8ths interest in this lease block through caveat placed of record on March 8, 1955 (emphasis ours).'
>
> Moreover, in paragraph 5 of the conclusions, Judge Wallace made the statement that prior to July 1, 1955, it:
>
> 'the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a *deliberate, unjustified assertion of interest* in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract (emphasis ours).'"

However, conceding arguendo that a separate finding using the word "malice" was required, the Court of Appeals should have remanded this case to the lower court for the purpose of making such a finding. As it is, by its ruling on this point, the Court of Appeals has made and supplied a finding of no malice and thereby usurped the trial court's function. This procedure is in direct conflict with:

First Circuit: *United Shoe Machinery Corp.* v. *Kamborian*, 160 F. 2d 461. In a patent case the trial judge rendered an opinion comprised of facts and law. As to a "critical point" of fact, the opinion was "equivocal." It was remanded for the single finding to be made.

Second Circuit: *Stella* v. *Graham-Paige Motors Corp.*, 232 F. 2d 299. Trial judge in a stockholder's action to recover short swing profits failed to make a finding because of his interpretation of burden of proof. Court of Appeals resolved the law as to burden of proof and remanded for a specific finding by the trial judge.

Third Circuit: *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122. This case was remanded because of lack of findings required by Rule 52(a). See also *Hopkins* v. *Wallin*, 170 F. 2d 136.

Fourth Circuit: *Hunter* v. *Scruggs Drug Store*, 113 F. 2d 971. In a bankruptcy case, the trial court omitted to make certain findings. The Court of Appeals found it "therefore necessary" to remand for findings. See also *City of Sumter* v. *Spur Distributing Co.*, 110 F. 2d 649.

Fifth Circuit: *Winter Park Tel. Co.* v. *Southern Bell Tel. and Tel. Co.*, 181 F. 2d 341. Trial court granted summary judgment for plaintiff without making any findings of fact. The Court of Appeals said:

> "In the absence of specific findings of fact and conclusions of law by the lower Court we will not undertake to say that there is no sufficient evidence to establish a right to recover the amount of the judgment in a suit at law upon an express or implied contract, although we have considerable misgivings on this score. . . ."

The case was remanded for findings of fact and conclusions of law. See also *Victory Towing Co.* v. *Bordelon*, 219 F. 2d 540, quoting *Kelley* v. *Everglades Drainage District*, 319 U.S. 415.

Sixth Circuit: *Bach* v. *Friden Calculating Mach. Co.*, 148 F. 2d 407. The trial court in a breach of contract action failed to make findings of fact and conclusions of law as required by Rule 52(a). The Court of Appeals, in discussing the omission, said that Rule 52(a) "was advisedly made mandatory and its language 'shall find the facts specially and

state separately its conclusions of law' makes the Rule applicable to every action tried upon the facts without a jury. . . ." The case was remanded to the District Court for findings and conclusions.

Seventh Circuit: *Kweskin v. Finkelstein*, 223 F. 2d 677. Trial court concluded against plaintiff, but failed to make findings of fact. Court of Appeals reviewed the record and although it stated it could not understand trial court's conclusion in view of the evidence, *it remanded the case for findings.* See also *Indemnity Ins. Co.* v. *Midwest Tranfer Co.*, 184 F. 2d 633.

Eighth Circuit: *Helfer* v. *Corona Products*, 127 F. 2d 612. The trial court failed to make findings of fact and conclusions of law and the Court of Appeals reviewed the case without them only because it had been a protracted litigation, the appellant was appealing in forma pauperis, and he urged the court to treat the report of the master and the opinion of the trial court as in compliance with Rule 52.

Ninth Circuit: *Paramount Pest Control Service* v. *Brewer*, 177 F. 2d 564. When "the record shows that there has been an omission in the trial court to find indispensable facts upon which the controversy in law depends, the Court of Appeals will remand the case to have the essential findings supplied by the trial judge." Citing *Hunter* v. *Scruggs* (C.A. 4, 1940) 113 F. 2d 971.

Ninth Circuit: *Irish* v. *United States*, 225 F. 2d 3:

> "This court is not the trier of the facts, nor does it substitute its own judgment for that of the trial court." "In a case where the necessary findings are lacking on appeal, the court does not dismiss the appeal, but vacates the judgment and remands the case to the district court for appropriate findings of fact." See also *Deering-Milliken & Co.* v. *Modern-Aire of Hollywood*, 231 F. 2d 623.

D. C. Circuit: *Fletcher* v. *Fletcher*, 219 F. 2d 768.

> "We are unable to exercise our appellate function . . . in the absence of findings . . ."

Although the Court of Appeals after reviewing the record felt that "*all the evidence*" was contrary to the trial judge's decision, the case was remanded for findings. See also *Burrell* v. *Martin*, 232 F. 2d 33; *Campbell* v. *Campbell*, 170 F. 2d 809.

That the Tenth Circuit's departure from the correct rule is firmly established in that circuit and not a one case aberration is indicated by its ruling in another nonjury case less than one year prior to to this case. In *United States* v. *Horsfall*, 270 F. 2d 107, a district court decision in a Federal Tort Claims Act case was appealed by the United States. The issue was limited to amount of damages. A total award of $85,440.06 was itemized by the district court to include:

> "Future loss of time . . . . . $17,550.00"
> "Permanent Disability . . . . . 45,000.00"

The trial judge found that the plaintiff had "sustained permanent disability and disfigurement" and that he "will sustain extensive permanent disability." He made no specific finding as to future loss of time. The Court of Appeals stated:

> "It is impossible for us to make any such determination (that findings were clearly erroneous) here as we cannot ascertain from the findings how the trial court gave effect to an important element of damage."

Having made this statement the court then made the startling decision to reverse and remand the case *with directions to enter an order requiring plaintiff to remit $17,550.00 of the judgment or face a new trial* on

damages. This decision is clearly in conflict with the correct rule prevailing in other circuits that such cases must be remanded for additional findings.

In all the circuits which have interpreted the effect of the omission of some or all findings required by Rule 52, all, except the Tenth, hold under the general authority of *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415, that such error requires remanding the case so that the trial court can supply the findings omitted.

While petitioner contends that the trial judge here made a finding of malice, if it was not made, Rule 52 required the Court of Appeals to remand the case for such a finding by the trial court, rather than make that finding itself without the benefit of seeing and hearing the witnesses themselves.

The necessity and correctness of the rule that prevails in all of the circuits but the Tenth is derived from Rule 52 itself. In the Rule it states:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In this case the vital questions involve the motives and intent of the respondent and its agents, whether they acted fraudulently or with malice to deprive petitioner of the just fruits of his contract, of his efforts in originally accumulating the leases and of his attempt to save those leases by drilling after July 1, 1955. What Mr. Justice Jackson said in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341, has particular bearing on petitioner's contention in this case:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit

> given to witnesses by those who see and hear them."

This is the essence of Rule 52(a). Because of it, in order to set aside a finding that has been made by a trial court, the reviewing court must find that it is "clearly erroneous." In order to reach a decision that a finding is clearly erroneous the reviewing court must have a definite and firm conviction that a mistake has been committed. As Judge Sanborn stated in *Cleo Syrup Corp.* v. *Coca Cola Co.*, 139 F. 2d 416, 417; cert. den. 321 U.S. 781:

> "In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law."

Although a certain amount of documentary evidence, i.e., the instruments making up the contract, was involved in this case, the issue of malice could only be determined from the witnesses. There were 17 witnesses for petitioner and 8 witnesses for respondent on the issue of liability. It is unquestionable that their demeanor and apparent credibility had to be taken into consideration. The Court of Appeals could not have taken these important factors into consideration and therein lies the evil of the Tenth Circuit's departure from the other circuits in the United States.

2. Conflict Between the United States Supreme Court and the Tenth Circuit

In many of the cases cited in the preceding subsection as in conflict with the Tenth Circuit, the authority principally relied upon was *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415. If the Tenth Circuit

decision does not conflict with this Court's *Everglades* decision *in fact*, it is certainly a conflict *in principle*.

Everglades was a bankruptcy case and does not interpret Rule 52 as such, but it lays down the rule as to findings of fact and the function of an appellate court as to them. This Court held: "it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make." (319 U.S. at 421) The case, which had been affirmed by the Fifth Circuit Court of Appeals was remanded by this Court to the District Court for "suitable findings."

Even had the Court of Appeals felt that the evidence would not justify the trial court finding favorably to petitioner, he had the right to have the essential fact found by the trial court. But, in its opinion (279 F. 2d at 444) the Court of Appeals said . . . . "the failure to withdraw the caveat . . . might have resulted in a slander of title . . . .", but the trial court did not include a finding as to the "essential ingredient of malice". In no part of the opinion does that court say there was no evidence of malice. The Everglades rule applies equally to Courts of Appeals, since on Certiorari from a Court of Appeals, the Supreme Court stands "in review in the same position as the Court of Appeals" in relation to the District Court's findings. *McAllister* v. *United States*, 348 U.S. 19, 20. The Everglades case, which had been affirmed by the Fifth Circuit Court of Appeals was remanded by this Court to the District Court for "suitable findings."

It is important for this Court to declare the correct application of Rule 52 and to do it expressly. In *Hatahley* v. *United States*, 351 U.S. 173, this Court remanded a Federal Tort Claims Act case before this

Court on a Writ of Certiorari to the Tenth Circuit. It was remanded for "appropriate findings" to the District Court. However, no discussion of Rule 52 was contained in the opinion and the Tenth Circuit apparently overlooked the import of this Court's refusal as an appellate court to review without necessary findings by the *trial court.*

Still another decision of this Court with which the Tenth Circuit is in conflict is *Panama Mail S.S. Co.* v. *Vargas*, 281 U.S. 670, in which the case was remanded to the trial court to supply omitted findings.

This Court has ruled more than once on Rule 52, but its decisions have never gone explicitly to the point involved here. In the *Yellow Cab Case*, quoted in the preceding subsection; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597; *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 381; *United States* v. *Oregon State Medical Soc.*, 343 U.S. 326, 332; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393 this Court was concerned primarily with the "clearly erroneous" standard to be applied in review of findings made under Rule 52. In this case, the Tenth Circuit, hearing decided that an essential finding had been omitted, undertook to make that finding itself and thereby overturned the decision of the trial court.

What the petitioner urges and what this Court has indicated by the Everglades decision and others is that a litigant in a nonjury case has the right to have the facts tried and decided by the trial court. This principle is analogous to the right to have a jury decide the fact questions in jury cases, a principle set forth by this Court in a variety of cases.

For example, this court in *Byrd* v. *Blue Ridge Rural Electric Co.*, 356 U.S. 525, held that the Court of Ap-

peals for the Fourth Circuit erred when it did not remand a case for a new trial and that the petitioner had been deprived of his opportunity, his "day in court", to present evidence against a defense which was not raised at the trial. The trial court had erroneously interpreted the South Carolina Workmen's Compensation statute and excluded an affirmative defense of respondent. The Court of Appeals reversed, holding that respondent was entitled to the affirmative defense and then that court found the defense to be proved from the record. The Supreme Court agreed with petitioner that he had been deprived of his right to come forward with proof of his own with regard to that defense at that stage of the proceedings, that is, in the trial court, and remanded the case to the District Court.

This Court's position in FELA cases on the plaintiff's statutory right to have a jury decide the factual questions, however limited, hinges on the same principle involved here. Petitioner realizes that FELA cases involve strictly statutory rights but the right to have facts tried at trial level is analogous. In those cases it is the jury, not the Court, that determines the facts. *Rogers* v. *Missouri P.R. Co.*, 352 U.S. 500, 504. Here in a non-jury civil action, under Rule 52 it is the trial court, not the appellate court, that tries the facts.

In a recent article in the Harvard Law Review (Vol. 73, No. 70, May, 1960) "Professor Hart's Theology", the Honorable Thurman Arnold at p. 1302 in discussing the Supreme Court and jury verdicts in negligence cases makes a point that petitioner believes applies equally to non-jury verdicts. Mr. Arnold explains:

> "When therefore the Supreme Court reviews a negligence case in order to compel *courts of ap-*

peals to respect jury verdicts, the Justices are doing far more than merely deciding an isolated evidentiary fact." (Emphasis added)

Petitioner submits that this is a novel question requiring the guidance of this Court, if Rule 52 is to continue to be interpreted in consonance with principles declared by this Court.

3. Does Rule 52 Require Reversal of a Judgment in a Litigant's Favor, If He Fails to Object to the Omission of a Finding?

In ruling upon the omission, in the eyes of the Court of Appeals, of a finding of malice by the trial court, the Court of Appeals for the Tenth Circuit embarked upon the novel view that petitioner, who was successful in the trial court, should have raised some objection to the purported omission. (279 F. 2d 436, 443) Petitioner, in his Petition for Rehearing, discussed this surprising aspect of the case at page 10 therein:

Petitioner's comments upon this error in its Petition for Rehearing below (pp. 10-11) apply to all Circuits and merit quotation here:

"The direction of entry of judgment in favor of the defendant will not only result in a great miscarriage of justice, but we submit that it involves a matter of extreme importance to successful litigants in the courts of this Circuit. In this connection, we are unable to understand the statement at page 21 of the opinion concerning the failure of Snakard to raise the question of the asserted omission before the lower court. In none of your former decisions in any of the above-mentioned cases, or in any of the cases from the other Circuits did the successful litigant raise or attempt to raise the omission. Neither this Court nor any of the other Circuits have held, to our knowledge, that such failure summarily required the rendi-

tion of a judgment against the successful party. If this is the meaning intended, then Your Honors have held directly contrary to the above cited decisions from this Circuit and also, directly contrary to the case of *Burkhard* v. *Burkhard*, 175 F. 2d 593, where there was an omission to make a finding but this Court held that the general judgment *implied a favorable finding* on the omitted issue.

"Such a construction or application of Rule 52 would cast an onerous burden on successful litigants and the trial courts of this Circuit. It would certainly be contrary to the generally accepted purpose of findings of fact as only being required to be sufficient to indicate the basis of the judgment; that all inferences are to be accorded findings which would support rather than strike down the general judgment, and would disrupt the settled law that an Appellate Court, will not, on disputed evidence undertake to make findings.

"It would in each instance, in this Circuit, require microscopic statement of fact in the findings, and if the trial court, although the matter were called to his attention by the successful litigant, did not see fit to make a correction, that successful litigant would then be in position of losing the case as that litigant could not appeal from the trial court's failure to include the findings he requested or changes requested [*Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 78 L. Ed. 1182; *Public Service Commission of the State of Missouri* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 83 L. Ed. 608; *Mach* v. *Abbott Co.* (8th Cir.), 136 F. 2d 7; *Automobile Insurance Co.* v. *Barnes-Manley Wet Wash Laundry Co.* (10th Cir.), 168 F. 2d 381; *Harding* v. *Federal National Bank*, 31 F. 2d 914; *Guaranty Co. of N. America* v. *Phenix Insurance Co.*, 124 Fed. 170]."[16]

[16] See also Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242.

That the view of the Tenth Circuit is completely wrong is demonstrated by Rule 52(b) which relieves a litigant of any obligation to object to or to move to amend findings before appealing. Furthermore, Rule 52(a) unequivocally states that requests for findings are not necessary for review. Why should a successful litigant be required to object to the omission of a finding when an unsuccessful litigant may obtain review even though he requested no findings he thinks should have been made?

4. The Conflict Between the Tenth Circuit and the Supreme Court of Oklahoma

In reaching its decision in this case, the Tenth Circuit came into direct conflict with the Supreme Court of Oklahoma on a question of substantive Oklahoma Law. One of petitioner's causes of action was the tort of slander of title. The Court of Appeals correctly stated at page 443 of 279 F. 2d 436 that: "The Oklahoma rule is that the principal element in a suit for slander of title is malice," and that the question of malice under Oklahoma cases is for the trier of the facts. But having reached this point, the Tenth Circuit departed from the law as established by the Oklahoma Supreme Court and came into conflict with that court in two respects.

First, after ruling, as mentioned above, that malice is a question for the "trier of the facts", the Court of Appeals failed to leave that question to the trial court either by accepting the plain meaning of the trial court's findings and conclusions, or by giving the proper inference that a general finding for plaintiff in a slander of title action amounts to a finding of malice, *Wilkerson* v. *Wasson*, 235 P. 206, or, having decided

that there was no malice finding, by remanding the question to the trier of facts.

Secondly, the Tenth Circuit, by finding against petitioner on the question of malice, came into direct conflict with the Oklahoma Supreme Court by failing to apply a controlling Oklahoma statute, 12 O.S.A., Section 1445, to this case.

Section 1445 reads:

> "An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown."

This section was specifically held to be applicable to slander of title actions by *Kingkade* v. *Plummer*, 111 Okla. 197, 239 P. 628. Therefore, the petitioner having proved the caveat filed by respondent was false and injurious and the trial court having found (and so stated in its conclusions of law) that the caveat was an unwarranted claim of a 7/8ths interest in the leases, a "deliberate, unjustified assertion of interest" by respondent, the petitioner was entitled to, and accorded by the trial court, a presumption of malice in his favor. Under the Oklahoma Supreme Court decisions interpreting Section 1445, upon petitioner's showing, which the trial court approved in its conclusions, that the filing of the caveat was unjustified and unwarranted, the statutory presumption arose and fully supports the trial court's judgment. *New England Oil & Pipe Line Co.* v. *Rogers*, 7 P. 2d 628; *Kingkade* v. *Plummer*, 111 Okla. 197; *Wilkerson* v. *Wasson*, 235 P. 206. The New England case states the Oklahoma rule with which the Tenth Circuit is in conflict:

> "The general rule is that, if plaintiff can show the publication was false in any material respect,

and he can also show special damages to himself, malice will be presumed, and a *prima facie* case of malice will be made. *Malice will be implied or inferred from the facts and circumstances of the case as they are ascertained to exist* * * * " (Emphasis added.)

5. The Court of Appeals Must Apply the Law of Oklahoma in Determining Whether Respondent Breached Its Fiduciary Duties to Petitioner

The Court of Appeals agreed with the District Court that the parties hereto were in fiduciary relation to each other, under Oklahoma law. Having made this bow to the laws of that great state, the Tenth Circuit then wrote its own law to describe the duties of that relation. According to the Tenth Circuit, a fiducial relation is just another contract, no more, no less. It held that the only fiducial duties were those spelled out in the contract between the parties.

In stating its view of the law the finding of fiducial duties, the Tenth Circuit cited *Holmes* v. *Keets*, D. C. Cir., 153 F. 2d 132, 133, and footnote No. 3 to *Champlin* v. *C.I.R.*, 10th Cir., 71 F. 2d 23, 27. The first case, of course, does not enunciate Oklahoma law and thereby violates the Erie doctrine. The second case, or rather, footnote, discusses only the question of existence of a partnership and not the duties therein involved. But be that as it may, in the *Holmes* case, the defendant owned an hotel. Plaintiff knew this before entering into a partnership with him for another hotel. The defendant added 25 rooms to his own hotel and plaintiff sued to recover a share of the profits, alleging that the building of the addition was in conflict with the partnership agreement. The D. C. Court of Appeals held that since the plaintiff had knowledge of the defendant's competitive position when he entered the con-

tract he was not entitled to presume that the partnership extended to that other hotel, nor was he entitled to share in the profits therefrom. This case did not raise a question of fiducial duty but was an inquiry into subject matter of the partnership. Clearly, that case has no applicability to this case.

Such is not the law of Oklahoma. This is. Joint venturers are fiduciaries and owe each other the utmost good faith. *Dyke* v. *Martin*, 204 P. 1106; *Martin* v. *Clem*, 280 P. 2d 826; *Knapp* v. *First National Bk. & Trust Co.*, 154 F. 2d 395 (C.A. 10). Joint venture contracts and activities are governed by the law of partnership. *Taylor* v. *Brindley*, 164 F. 2d 235; *Boles* v. *Beekers*, 244 P. 182. Section 10, Title 54, O.S.A. provided that partners must treat each other with "highest good faith", and the "slightest concealment, misrepresentation, threat or adverse pressure" is prohibited. In Oklahoma, statutes and decisions existing at the time of a contract are incorporated in it. *Oklahoma Cotton Growers Assoc.* v. *Salyer*, 114 Okla. 77, 243 P. 232; *Allied Reserve Life Ins. Co.* v. *Cragg*, 31 Oklahoma Bar Journal 1226.

Respondent treated its fiduciary like this:

(A) Filed the caveat wrongfully asserting seven-eighths interest in all of the leases and thus claimed adversely three-fourths of Snakard's one-half interest.

(B) Took a series of steps (Finding No. 11) calculated to force Snakard to accept a farm out with Inland Oil Company, referred to as Frankfort's "district office" whereby Snakard's interest would be further reduced.

(C) Represented that it was going to drill all of the block (Finding Nos. 13, 15). It now claims it never had such intention.

(D) Obtained extensive seismic information and other geological data which conclusively showed that the prolific Second Wilcox structure extended south rather than northeast (Finding No. 16).

(E) Charged the cost of some of this geological information to Snakard, but did not reveal to him the geological and subsurface information it had critical to the specific area (Finding No. 18).

(F) Repeatedly represented that the structure lay to the north and east and that there would be considerable risk in drilling a well to the south (Finding No. 19).

(G) Commenced drilling to the north and east and continued to misrepresent and falsely reported the Erwin No. 2 Well as a producer when it was dry in the Second Wilcox and violated the Oklahoma law in producing oil from the Erwin No. 1 and stating to the Oklahoma Corporation Commission that it was coming from the Erwin No. 2 (Findings Nos. 20, 21);

(H) Although advised by its attorney to release any leases it was not going to drill (Finding No. 24) it never did tell Snakard that it was not going to drill the Thomas and Christian leases and did not drill them, but attempted until the last minute to force him into the farmout with Inland Oil Company.

(I) When it did not drill the Thomas, Christian and Simpson leases it refused to release the seven-eighths interest claimed by the caveat in such leases and attempted to block Snakard's drilling efforts on these leases by action before the Corporation Commission, after its interest in these leases had expired.

(J) Deliberately and unjustifiedly clouded Snakard's title to the undrilled leases which prevented him

from taking action to save them (Concl. No. 5), and unwarrantedly clouded Snakard's title by the caveat which it had placed of record (Concl. No. 6).

The trial judge, applying the Oklahoma requirement of the "utmost good faith" and the Oklahoma prohibition against the "slightest concealment, misrepresentation, threat or adverse pressure" to this joint venture, reach the only logical and just conclusion that could be derived from the enumerated facts. He concluded that "Frankfort breached its fiducial duty" to petitioner (Concl. No. 6). If the Court of Appeals had applied this Oklahoma law, it could not have reached a different conclusion.

6. Court of Appeals Should Have Affirmed Judgment for Petitioner or Remanded for Additional Findings, Even If No Malice Was Proved or Found

In Paragraph (4) of his Amendment to Amended Complaint (T.R. 85), petitioner charged:

(4) ". . . The filing of record of said caveat clouded title to the oil and gas leases covering the lands described therein upon which no wells had been drilled before the expiration of said leases. The first three named defendants wrongfully refused to release said caveat of record as to the leases upon which no wells had been drilled, which wrongful refusal obstructed and prevented the drilling of oil and gas wells thereon by others, from which the plaintiff would have made a substantial profit, *all of which actions constituted a tort* entitling the plaintiff to recover for all damages occasioned thereby." (Emphasis added)

In *Mangum Electric* v. *Border*, 222 P. 1002, the Oklahoma Supreme Court defined the tort of "malicious wrong" in the Syllabic:

3. "The intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another, or that other persons property or trade is actionable, if done without just cause or excuse, such intentional action when done without just cause or excuse is what the law calls a "malicious wrong",

4. "Any intentional act which in the ordinary course will infringe upon the right of another to his damage is wrongful, except it be done in the exercise of an equal or superior right."

Facts have been set out above in this petition and are supported by the trial record that:

a. Petitioner hired a drilling contractor, Bradley, to drill the Thomas and Christian leases after July 1, 1955. (T.R. 160, 249).

b. Bradley was forced to cease operations, causing the leases to be lost, because the caveat was intentionally left on file, "without just cause or excuse," thus preventing either Bradley or petitioner from obtaining money needed operate. (T.R. 253, 255).

c. Money would have been invested if the Caveat had been withdrawn. (T.R. 255, 278).

d. Respondent refused to withdraw the Caveat, even though advised to do so by it's attorney (T.R. 439) and asked to do so by the petitioner. (T.R. 161-2).

This Court in *Weade* v. *Dickmann, Wright & Pugh*, 337 U.S. 801, 809, held that a Court of Appeals which had reversed a verdict for plaintiff and remanded with directions to enter a judgment for defendant, because

plaintiff could not recover from defendant as a common carrier, may not direct entry of a judgment for defendant when the pleadings suggested and the evidence alleged defendant's liability by reason of negligence. The case was remanded for further trial of the facts.

The rule of the Weade case is plainly applicable here. The Tenth Circuit did not consider the tort of "malicious wrong" after it decided that the tort of slander of title did not exist in the absence of a trial court finding of malice. The elements of "malicious wrong" as defined in the Mangum case, *supra*, are:

1. an intentional act
2. intended to damage
3. and which, in fact, damages
4. a person, his property, or his trade
5. without just cause or excuse

No malice is necessary. The absence of "just cause or excuse" completes the tort. Having decided that no malice was found by the trial court, the Tenth Circuit could and should have affirmed the trial court's judgment on the basis of this second alleged and proved tort, or, at least, should have remanded to the trial court for new findings or for further proceedings, as was done in the Weade case, *supra*.

The principle underlying this Court's position in the Weade case, that a litigant has a right to his day in court. Petitioner alleged several bases for respondent's liability in the trial court. Whether the trial approved or excluded any one of these must be gleaned from the findings. If the Court of Appeals was in doubt as to whether the trial judge found a "malicious

wrong" to have been committed, it should have allowed the trial court the opportunity to speak specifically, just as it was required to have the trial court find the presence or lack of malice as to the tort of slander of title.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and this Court should direct the Court of Appeals to reinstate the judgment of the District Court or, in the alternative this Court should remand this case to permit the District Court to make specific findings on such matters as the Court of Appeals found lacking.

Respectfully submitted,

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APPENDIX A

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. On November 11, 1954, plaintiff Snakard contracted with defendant Frankfort Oil Company through written instruments identified as Exhibits "A", "B", "C", "D", "E", and "F" (attached to original complaint). In consideration of $1.00 per acre, plaintiff agreed to assign unto defendant a one half interest in 1280 acres of leases plaintiff held in the North Wellston Pool and to pay one-half of the cost relating to title examinations and curative measures. These joint leases are specifically described as all of Section 35 and the SW 4 of Section 36 in Township 15N, Range 2E; and, the W 2 of Section 2 and the NE 4 of Section 3, Township 14N, Range 2E, Lincoln County, Oklahoma.

2. Under this agreement defendant was to have a test well drilled upon the leasehold block to the Arbuckle formation. The drilling contract was made to plaintiff and provided for payment at the rate of $8.00 per foot; this per foot contract was considerably higher than the customary drilling cost in the area and was given to enable plaintiff to make a profit of approximately $25,000 per well completion.

3. After the first well, each party to the contract was at liberty to elect whether he or it would drill an additional well or wells, and each party was required to designate whether or not he or it would participate in any well drilled by the other. Each participating party was obligated to pay one-half of the cost thereof and was to receive one half of the production proceeds.

If defendant chose not to participate, its interest in the well was lost. If plaintiff chose not to participate, the defendant became the owner of the entire working interest in the well and plaintiff owned no interest in the production

until such time as defendant received 200% of the amount which plaintiff would have paid for his one-half of the cost and expense, had he participated. During the time plaintiff held this 1/8th of the working interest he was to pay 1/8th of the operating expense. When the defendant received this 200%, the plaintiff then was to again own one-half of the working interest production; and, at such time plaintiff was to pay one-half of the operating cost.

4. Defendant had the right of 'first' refusal to purchase all or any portion of plaintiff's interest which plaintiff wished to sell and on which plaintiff had a bona fide offer of purchase.

5. A number of the assigned leases contained drilling clauses. Defendant was entitled to comply with any of the drilling clauses it so chose and the provisions in the letter agreement applied to financing plaintiff's part of the expense.

6. The exploration well, the Stanolind No. 1, was drilled to the Arbuckle limestone. Because of water, the well was abandoned. However, tests of this well indicated that there was a prolific second Wilcox pool in the area.

7. At about the time the first well, the Stanolind No. 1, was completed, plaintiff was sued in the District Court of Lincoln County, Oklahoma, by Gordon Burdett, who alleged that he and Snaicard had entered into a joint venture concerning the production of these leases and that he was entitled to one-half of plaintiff's proceeds from this transaction with the defendant. When this well was completed, the defendant paid plaintiff an amount of money sufficient to meet plaintiff's obligation to the drilling contractor, but withheld the remainder pending the termination of the Burdett litigation.

8. During January of 1955, defendant contracted with Inland Oil Company to operate this lease block.

9. The Erwin No. 1 well was completed in the SW 4 of SW 4 of Section 35 on or about February 24, 1955, as a splendid second Wilcox producer.

10. Shortly after the completion of the Erwin No. 1 well, Pres Cochran, Inland's president, offered plaintiff $100,000.00 for plaintiff's interest in the entire lease block.

When plaintiff refused to sell, Cochran and his geologist, Roy Carmach, made a trip to Bartlesville, Oklahoma, and displayed to Ray Shaffer, defendant's general manager, a sub-surface geological map, which showed that the top of the second Wilcox structure extended onto the Thomas lease in the NW 4 of Section 2, 14N-2 W, and made a deal with Shaffer to give to Inland a farm-out whereby in return for drilling a well, Inland would be given one-half interest in certain parts of the lease.

11. Thereafter, the defendant took a series of steps calculated to persuade or require plaintiff to accept the farm-out proposal with Inland. These steps continued through March, April, May and June of 1955.

12. On March 8, 1955, immediately after the completion of the Erwin No. 1, defendant, pursuant to advice of counsel, filed with the County Clerk of Lincoln County the caveat set forth in plaintiff's complaint which described the property covered by the contract between plaintiff and defendant. This caveat referred to the contract between the parties, recited that the contract provided for the sale and transfer from plaintiff to defendant of an undivided ⅛ interest in and to the leases then owned and thereafter acquired by plaintiff, notified the public that defendant had performed its contractual terms and was the owner of an undivided ⅛ interest in and to said leases, and warned that any party purchasing any interest in the leases did so at his own risk or peril.

13. On April 8, 1955, defendant wrote plaintiff regarding the eight wells which had not been drilled or commenced

on the basic leases at that time. This letter indicated that defendant had elected to drill the eight remaining wells in the block, and requested plaintiff to make his election as to whether "to participate or be a non participating member" under their Joint Operating Contract.

14. On April 15, 1955, Snakard, by letter, agreed to be a non-participating party. The defendant did not respond to plaintiff's letter of election.

15. On April 18, 1955, Frankfort's attorney and active representative wrote in part:

"It must be understood that Mr. Snakard will execute assignments in the future to each of the various leases as we start wells on them.

"We want to go ahead and get all of these properties drilled up by the July deadline and it is going to require the expenditure of tremendous sums of money * * *

"The matter has been pending entirely too long and with the July deadline for drilling many additional wells * * *"

16. During April and May of 1955, defendant procured extensive seismic information, together with other geological data; this information conclusively showed that the top of the highly prolific second Wilcox structure, on which the Erwin No. 1 and Meadors Estate No. 1 wells had been completed, extended toward the southeast in the Thomas lease, and, such structure also extended somewhat into the Christian lease in the NE 4 of Sec. 2 14N 2E.

17. Frankfort's exploration manager, Mr. Caswell, in a report to Frankfort's management on April 1, 1955, stated that in his opinion a forty acre location on this second Wilcox structure had a potential production of two million barrels of oil, and that the two locations to the south of the Erwin No. 1 were about as sure as you could have for second Wilcox production.

18. At no time did the defendant disclose to plaintiff the pertinent geological and sub-surface information it had critical to this specific area. The acquisition cost of some of this data was charged to plaintiff.

19. The defendant repeatedly represented to plaintiff that the producing structure lay to the north and east of the Erwin No. 1 and Meadors Estate No. 1 wells, and that there would be considerable risk in drilling a well on the Thomas lease.

20. In drilling sequence, defendant moved north and east from the Erwin No. 1 well and drilled the Magnolia No. 1 well which was dry in the second Wilcox and was completed as a shut in gas well in the Oswego. Thereafter, the defendant moved northward and drilled the Clark No. 1 and Nitner No. 2 in the SW 4 of NE 4 and SE 4 of NE 4 of Section 35, respectively. These two wells were dry in the second Wilcox and completed as shut in gas wells in the Oswego. On May 29, 1955, Frankfort commenced the Erwin No. 2 as a north offset to the No. 1 Erwin, at a time when this lease was already held by the No. 1 Erwin.

21. The Erwin No. 2 was dry in the second Wilcox, then plugged back to the Oswego and reported as a second Wilcox producer. Moreover, the Erwin No. 2 was credited with full production from the second Wilcox when in fact it was actually run from the Erwin No. 1. On June 7, 1955, Frankfort started the Amerada State [illegible] NE 4 of NW 4, a diagonal offset to the northeast of the Erwin No. 2, and an offset to the West of the Clark No. 1.

22. Between March 1 and June 28, 1955, the defendant drilled five wells to the north of the Erwin No. 1 and the Meadors Estate No. 1, none of which were productive in the second Wilcox. These wells were drilled in spite of the seismic and other geological data that indicated that the second Wilcox high was to the south of the Erwin No. 1 and the Meadors Estate No. 1, and that the [illegible] to the north was a separate structure [illegible]

23. Plaintiff assigned to defendant a one-half interest in each lease on which defendant drilled a well; however, the defendant received no such assignment as to the undeveloped leases.

24. Defendant was advised by its attorney that if any or all of the basic leases were not going to be drilled by [illegible] that those not drilled should be released to plaintiff within a reasonable time prior to July 1, 1955, so that plaintiff could effectively deal with such leases.

25. On June 29, 1955, defendant advised plaintiff that it released any claim it might have as to the Lee lease (SW 4 of Section 36) and the Simpson lease (SW 4 of Section 2) stating by letter that since Snakard had not executed assignments covering the leases, no further action would be required on defendant's part and again requested plaintiff to join in the farm-out agreement to Inland.

26. On July 1, 1955, the plaintiff, without notice to defendant, commenced drilling operations upon the Thomas tract (NW 4 of Section 2).

27. Defendant did not later acquire any interest in the expired Mansfield, Christian, Thomas, Simpson or Lee leases.

28. Plaintiff substantially performed all obligations resting upon him under the contract with defendant.

Conclusions of Law

1. The written instruments attached to the original complaint and identified as Exhibits "A", "B", "C", "D", "E", and "F", should be construed together as the contract between the parties.

2. These instruments created a joint venture status and a fiduciary relationship between plaintiff and defendant Frankfort.

3. When executed, the agreement only placed upon the defendant an absolute duty to drill one well. However,

the contract gave each of the parties an option to elect to drill additional wells in the involved block.

4. The defendant elected to drill the remaining undeveloped leases and in then failing so to do breached its contractual agreement with plaintiff.

Defendant's election is pointed up by the caveat filing of March 8, 1955, since defendant could only have made a claim to the entire 7/8ths if it drilled such leases and if the plaintiff were a non participating partner. In addition, defendant's letter of April 8, 1955, requested plaintiff to elect whether he would be a participating or non participating partner. On April 15th, plaintiff, by letter, indicated he would be a non participating partner.

5. If, in fact, the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of the leases prior to their expiration, a right plaintiff held under the terms of the contract.

Whether defendant improperly clouded plaintiff's title to coerce plaintiff into approving the controverted farmout, or for some other reason not apparent in the record is immaterial. This was an act contrary to defendant's rights under the agreement and encroached upon plaintiff's contractual rights, separate and apart from the fiduciary relationship.

6. Moreover, defendant Frankfort breached it's fiduciary duty owed plaintiff by failing to fairly and openly reveal the geological information it possessed directly bearing on the agreement's subject matter, by overreaching plaintiff in connection with the proposed farmout to Inland in affirmatively misrepresenting the location of the Second Wilcox producing structure, and by unwarrantedly claiming a 7/8ths interest in this lease block through the caveat filed of record on March 8, 1955.

7. Plaintiff is entitled to any damages from defendant Frankfort which directly flowed from the defendant's breaches referred to above.

An additional hearing will take place limited exclusively to the issue of damages.

Dated this 27th day of May, 1958.

W. R. Wallace
United States District Judge

Filed May 27, 1958.

United States District Court
for the
Eastern, Northern and Western Districts of Oklahoma

R. W. Wallace, Judge — Oklahoma City 1

July 10, 1958

Messrs. Robinson, Shipp, Robinson and Barnes, Hightower Building, Oklahoma City 2, Oklahoma. Mr. P. D. Erwin, Attorney, Chandler, Oklahoma. Messrs. Looney, Watts and Looney, First National Building, Oklahoma City, Oklahoma. Messrs. Dudley, Dudley and Dudley, First National Building, Oklahoma City, Oklahoma.

Re: Snakard vs. Frankfort Oil Company, a division of Carstairs Bros. et al., No. 6931 Civil W. D. Okla.

Gentlemen: The plaintiff is entitled to recover those damages which can be shown with a reasonable degree of certainty resulted from defendant's breach of contract.

The court will not make an award based upon speculation or conjecture. If the plaintiff can establish with the required certainty the amount of oil which would have been produced had the defendant performed its obligations, and demonstrate the cost of drilling and production, the court can then allow the defendant the credits to which it is entitled under the agreement, and arrive at a figure which

represents the actual loss suffered by plaintiff. Naturally, the defendant will be entitled to offset any amount or amounts shown to have been received by plaintiff, if any, as a result of his attempted mitigation of damages.

If the plaintiff cannot establish with reasonable certainty the likely production and expense in connection therewith, the court will make an award which under all the evidence produced by both sides most nearly represents the monetary loss sustained by the plaintiff.

Very truly yours,

W. R. Wallace

Filed July 22, 1958.

United States District Court
for the
Eastern, Northern and Western Districts of Oklahoma

W. R. Wallace, Oklahoma City, Judge

December 30, 1958

Messrs. Looney, Watts, Looney & Nichols, Attorneys, First National Building, Oklahoma City, Oklahoma. Messrs. Dudley, Dudley & Dudley, Attorneys, Liberty Bank Building, Oklahoma City, Oklahoma. Messrs. Robinson, Shipp, Robertson & Barnes, Attorneys, Hightower Building, Oklahoma City, Oklahoma.

Re: Snakard vs. Frankfort Oil, No. 3931 Civil, W. D. Oklahoma.

Gentlemen: The court has considered [illegible] features of defendant's witness, Mr. [illegible] on defendant's exhibit 28 as probably [illegible] gross barrels of recovery reasonably to be anticipated from the controverted leases. Such gross recovery [illegible] 1,070,000 barrels. From this gross recovery Mr. [illegible]